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Divorce, Custody, Support, Enforcement: Transferring and Sharing Jurisdiction

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DIVORCE, CUSTODY, SUPPORT, ENFORCEMENT: TRANSFERRING AND SHARING JURISDICTION

ISSUE DEFINITION

A relatively unnoticed but important proposal discussed at two federal-provincial constitutional conferences in the late '70s and early '80s involved the divesting by Parliament of its exclusive jurisdiction over marriage and divorce to the provinces and granting to the provinces the power to appoint judges with superior court jurisdiction over family matters. This move was intended to allow the integration of legislation in the areas of marriage and divorce with relevant legislation and policy in areas already under provincial control.

The proposal was opposed by women's groups and family lawyers. They argued that more uniformity, not less, was needed in the family law area. They pointed to the fact that even with shared jurisdiction the provinces were, in effect, responsible for the enforcement of support and custody orders. Their performance was dismal: statistics indicated that 75% of all support orders were in default at some stage; an estimated 10,000 child kidnappings occurred each year in violation of custody orders. If provinces were given total control over family law, the argument continued, the situation could only become worse.

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BACKGROUND AND ANALYSIS

A. Present Constitutional Division of Powers in the Family Law Area

By s. 91(26) of the B.N.A. Act Parliament has jurisdiction over marriage and divorce. The power over divorce has been judicially interpreted to include matters necessarily incidental to divorce, in particular awards of custody and monetary support (the technical term is "maintenance") for a spouse and the children of the marriage.

By s. 92(13) the provinces may make laws with respect to property and civil rights in the province. This power clearly allows legislation with respect to custody and support in cases where divorce is not directly an issue. Such legislation would regulate a couple's obligations to support each other and their children during the lifetime of the marriage, or their obligations upon separation in the absence of divorce. Legislation with respect to custody is relevant in such cases and also where parental mistreatment of a child makes it necessary for the state as a third party to act for the benefit of the child. The power over property allows the provinces to make special provision for the determination of the ownership of property acquired or used during a marriage.

In addition to provincial powers given by s. 92(13) superior courts of the provinces have inherent authority over the custody of children through the exercise of the Royal Prerogative. This jurisdiction is called "parens patriae". It may be exercised independently of provincial legislation, and, it has been argued, of federal legislation.

B. Exercise of the Federal Power

Until 1968 Parliament did not enact any substantive legislation with respect to marriage and divorce. As a result, by s. 129 of the B.N.A. Act and various acts of union with the western provinces and Newfoundland, until 1968 the divorce law applicable to a province was the law in force at the time of union (in some cases as amended by federal enactment). This meant that there were at least three sets of divorce laws

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in Canada before federal intervention in the area: Ontario and the western provinces were governed by English law established in 1857, Nova Scotia and Prince Edward Island, by similar pre-Confederation colonial statutes enacted between 1758 and 1761; and New Brunswick by its own colonial law of 1787. Quebec and Newfoundland legislation before union did not provide for divorce, and the situation was not amended by federal enactment. In these provinces divorces were obtained by individual Acts of Parliament.

In 1968 the present Divorce Act was adopted and had the effect of establishing one law throughout Canada. The relevant provisions of the Act for the purposes of this discussion are the following: (1) jurisdiction - no one can apply for a divorce in a province unless he or she has lived there for one year; (2) grounds - an applicant has the right to a divorce if the other spouse has been at fault in ways set out in the Act, or if there has been a permanent breakdown of the marriage as set out in the Act; (3) "corollary relief" - if an order for divorce is granted the court may order payments to be made to a spouse or child of the marriage for their maintenance, and may make an order with respect to the custody of the child (the order may be varied by the court which made the order); (4) enforcement of orders - a divorce decree has legal effect throughout Canada; custody and support orders may be registered in any superior court in Canada and enforced in the same way as an order of that court.

Since 1970 the provinces have radically revised their own laws with respect to support of dependants, custody, and the ownership of matrimonial property.

C. Problems Arising from a Shared Jurisdiction

First, the question of what provincial legislation, if any, can apply to divorced spouses and their children has not been decided. On one theory the federal government has "occupied the field" of divorce and corollary relief so that even if no order for custody and maintenance is made at the time of divorce, provincial legislation in these areas is excluded. This is a disturbing position in the light of a common Ontario practice, which is to settle custody and support matters at the time of marriage breakdown in a family court (where variations and enforcement

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procedures are less formal, time-consuming and expensive than in other courts) and then to obtain a divorce decree which is silent with respect to corollary matters (on the assumption that the orders obtained earlier are still valid).

A variant of the occupied field theory upheld by some courts is that an order for corollary relief when actually made ousts all future provincial orders. While this position seems to be generally accepted with respect to maintenance, it is disputed as applicable to custody orders. Some courts have decided that provincial parens patriae jurisdiction permits the redetermination of a custody issue already the subject of a divorce order, or at any rate allows a temporary award to be made for the protection of a child present within the jurisdiction.

As well, it has been argued that federal legislation does not occupy the whole field of child custody but only the determination of custody as between the divorced parents. On this view an award in favour of a child's (non-parental) relatives or the state may be valid despite the existence of a previous federal order in favour of one of the parents.

This problem is not simply a matter of legal theory. As a result of shared jurisdiction custody and support orders are multiplied to the confusion of those subject to them. Lack of agreement as to which custody order is to predominate, or on what grounds a court is to make a decision on the matter, encourages parents who have been denied custody in one province to run away with their children to another where they might well be more successful. This uncertainty also inhibits the development of coherent policies in areas only tenuously related to divorce. Decisions about whether the natural parents of an adopted child should be allowed access to the child, or whether a child should be taken from parents because they have mistreated it, should not be made on the basis of an outstanding federal order with respect to the child, but on the child's well-being. Many courts have recognized this and have upheld the validity of provincial legislation in such cases. But the uncertainty of these decisions from a legal point of view encourages litigation and promotes delay when inaction is most harmful - when a child's life is left unsettled.

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A second problem is that the present position has frustrated the attempts of a number of provinces to establish a court which recognizes the anomalous place of family litigation in an adversarial legal system, and which deals with family issues informally, quickly, and with provision for non-adversarial settlement. By s. 96 of the B.N.A. Act the judges of such a court must be federally appointed because they deal with some matters historically within the jurisdiction of a superior court alone. However, the provinces claim that they are better suited to make appointments in this area.

This situation has again resulted in confusion. On the one hand provinces have set up "family courts" with provincially appointed judges as an alternative forum to the more crowded and costly county and superior courts, on the other, to conform to constitutional demands the judges are given restricted powers. Paradoxically, in these provinces the most efficient way of solving family matters may involve application to all three courts: the family court for a quick resolution of an ugly domestic situation, the county court to deal with division of property on separation (which is not within the purview of the family court), and eventually, the Supreme Court for a divorce.

D. Problems Arising from a Diversity of Jurisdictions

The fact of provincial control over family matters has become problematic as a result of increasing mobility of our society. As married Canadians move from province to province acquiring and disposing of property, what provincial law applies to them? Can one "shop" for a province in which to be married or separated because its laws with respect to property are more favourable than another's? Do rights to custody and support survive a move by either parent into another province? These are difficult issues because each province is an independent legislating entity; its courts and other institutions are not bound, with respect to provincial matters, by the law of another province simply because they are both part of the same federation. The provinces do in fact have laws to deal with situations that have an out-of-province element, but such laws and their administration in the family area are inadequate.

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With respect to support orders all provinces have uniform reciprocal enforcement of maintenance legislation which sets out the conditions under which a province will honour an extra-provincial (and non-federal) support order. Unfortunately, the procedure is complicated and so it is necessary to have a lawyer in the enforcing province, and in some cases the process will have to be repeated again and again if the defaulting spouse continues not to pay. In situations where a support order has been obtained in the absence of a spouse (because he has taken care to leave the province), a second hearing is required in the enforcing province, an occasion for more delay, and the original order may well be changed. There are no provisions for the interprovincial tracing of defaulting spouses.

Out-of-province custody orders receive no better treatment. Only eight provinces have uniform legislation for the enforcement of extra-provincial (non-federal) custody orders: Quebec and Ontario do not. The legislation itself allows variation of an out-of-province order on the vague ground that the child had no "real and substantial" connection with the jurisdiction in which the order was made, (an order may also be varied if the child will come to serious harm if a new order is not made). The uncertainty of the ground encourages kidnapping and relitigation of custody issues in another province, with its attendant delay and costs to the custodial parent, including those of finding the child. To date, Manitoba is the only province which offers free legal counsel to a parent whose child has been taken and brought to the province, and a service for tracing the missing parent and child.

In short provincial jurisdiction over support and custody has resulted in legislation which creates grave difficulties for those with out-of-province orders, and in effect ignores them. As a result spouses refuse or neglect to pay support and parents run off with their children. This state of affairs has not been caused solely by the reluctance of the provinces to enforce each other's laws, but it has surely been affected by their position.

Federal divorce legislation which is potentially a source of uniformity with respect to the enforcement of orders made pursuant to a

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divorce decree does not come to grips with the problem. The Divorce Act does provide that orders may be registered in any province and enforced as orders of that province. In theory this saves the cost of a provincial reciprocal proceeding. In fact, as has been shown above, federal custody orders at least may be varied. Moreover actual enforcement of all orders is left to provincial authorities. As statistics indicate, provincial legislation itself has been unsuccessful in dealing with enforcement within its own borders.

E. Federal-Provincial Responses to the Problems

In February 1979 at the First Ministers Conference on the Constitution the only one of the draft proposals on which there was "virtual" agreement was that concerning the division of powers in the family law area. The terms of the draft were:

(1) The provinces were to have exclusive jurisdiction over marriage.

(2) Parliament and the provincial legislatures were to have concurrent jurisdiction over divorce with provincial paramountcy, with the following exceptions:

   (a) Parliament was to have exclusive jurisdiction over the recognition of divorce decrees and "jurisdiction" (the determination of the appropriate court in which to apply for a divorce);

   (b) The provincial legislatures were to have exclusive jurisdiction in the area of corollary relief.

(3) Provincial legislatures were to be given the power to appoint family court judges with the jurisdiction of a judge of the Superior Court of the province.

The proposal was obviously drafted to solve the problems arising from a shared jurisdiction in family matters (set out in section C of this review). It was supported by the Report of the Special Joint Committee on the Constitution of Canada in 1972 (the Molgat-MacGuigan Report), the Canadian Bar Association Research Study on the Constitution (1978) and the Pépin-Robarts Report in 1979.

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However, for the most part the proposal ignored the problems created by the establishment of diverse jurisdictions. A divorce decree would be recognized throughout Canada; "divorce havens" would be prevented by federal control over residency requirements; but Parliament was left with no control over the support and custody of spouses and children but the criminal law power, and a chance for truly uniform legislation in these areas was lost. This concern was expressed at the 1979 conference by Newfoundland and Manitoba who only reluctantly agreed to the proposal "in the best interest of consensus." Manitoba also voiced another objection not already discussed. The proposal allowed the provinces to set their own grounds for divorce. This would not result in the establishment of Canadian "Renos" but it would permit a certain amount of "forum shopping" for those who wanted a divorce and were financially able to fulfil federal residency requirements in order to get one.

Between 1979 and September 1980 opposition to the proposal mounted from those who saw themselves directly and adversely affected by it: women, the major recipients of support payments and holders of custody orders, and family lawyers, who had experienced the frustration of trying to collect money from disappearing husbands, of trying to get police to help locate a missing child, of explaining to a mother with a custody order obtained in Nova Scotia that she somehow had to find the money and take the time off work to attend another custody hearing in Alberta.

In response to this opposition, a redrafted proposal was put before the First Ministers at the next meeting on the Constitution held in September 1980. The following additions were included:

(1) An order for maintenance or custody made in Canada (exclusively a provincial matter) would have legal effect throughout Canada, could be registered in any other province, and enforced as an order of that province.

(2) The provinces could make laws providing for the variation and non-enforcement of orders on the grounds that

(a) circumstances had changed;
(b) public policy had been violated;
(c) the order was made without due process of law.

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No restrictions were imposed on the power of the provinces to determine the grounds for divorce.

The new proposal was flatly opposed by Manitoba and Prince Edward Island. Manitoba suggested instead that federal jurisdiction be expanded to cover the enforcement of any support or custody order, provincial or federal. Other provinces, while not prepared to reject the proposal entirely, were sympathetic to its opponents. British Columbia, Saskatchewan and Alberta expressed their own reluctance to change the existing grounds for divorce although they did not suggest that jurisdiction over grounds should be left in federal hands. Saskatchewan and New Brunswick felt that the proposed enforcement section should be revised. In the end the Ministers agreed to refer the matter of the enforcement provision to the Continuing Committee of Ministers on the Constitution for revision. The Committee never met again.

Subsequent events made it clear that jurisdiction over divorce was not going to be transferred in the foreseeable future. Substantial amendments to the Divorce Act were introduced in 1984. Completely new legislation, the Divorce Act, 1985, has been given Royal Assent and will be in force in May or June 1986.

It has become equally clear that the provinces will continue to assume the bulk of the responsibility with respect to the enforcement of support and custody orders, although jurisdiction in this area remains divided.

In June 1981 the issue of enforcement was made the subject of a new intergovernmental committee. Federal and provincial deputy ministers responsible for the administration of criminal justice established the Federal-Provincial Committee on the Enforcement of Maintenance and Custody Orders. The Committee prepared a number of interim reports and submitted a final report in June 1983.

In this report the Committee made a number of recommendations addressed to provincial governments. These were designed to make the process of enforcement within a province simpler, cheaper and more effective in ensuring payments to spouses. With respect to the particular problem of enforcement of out-of-province orders, the Committee

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urged that provinces not be allowed to vary such an order without another hearing before the dependent spouse. Provinces were also asked to pass legislation which would allow the release of information about the whereabouts of a debtor spouse in cases where he or she had disappeared.

The Committee also addressed recommendations to the federal government. Nearly all of these have been incorporated into legislation or proposed legislation: the Garnishment, Attachment and Pension Diversion Act; Bill C-47 - the Divorce Act, 1985; and a companion bill, Bill C-48 - the Family Orders and Agreements Enforcement Assistance Act. This legislation will be discussed in Section F. A proposal which received a certain amount of notice, the creation of a Central Registry for filing all support and custody orders, was not adopted. In March 1985 a further study, by Status of Women Canada, on the costs and benefits of such a scheme concluded that it would do little to improve day-to-day enforcement of these orders.

The Committee proposed a series of recommendations for ongoing federal-provincial action, including the designation of government representatives who would ensure that Committee recommendations are carried out and that discussion of enforcement issues is continued. These too have been implemented.

F. Recent Developments

1. Federal Legislation

(a) Bill C-127, now S.C. 1980-81-82, c. 125 (Criminal Code Amendments)

In January 1983 Bill C-127, was made law. The Bill is chiefly concerned with amendments to the sexual assault provisions of the Criminal Code. However, it also contains important amendments to the Code which are designed to stop parents from kidnapping their children to avoid the effect of a custody order, and to indicate clearly to the police that they are responsible for locating the missing parent and child.

The Bill makes it a crime, under certain circumstances, for a parent to keep or hide any child of his or hers under 14. If the parent

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has the child in contravention of a custody order made anywhere in Canada and intends to take the child away from the custodial parent, he may be prosecuted by indictment. In that case, conviction carries with it a possible prison term of 10 years. Even if there is no custody order, a parent who takes his child intending to deprive the other parent of the child is guilty of an offence which may also be proceeded with by indictment, with the same maximum penalty. To guard against frivolous or premature prosecution where there is no custody order, the Attorney-General (in practice the local Crown prosecutor for any region) must consent to the prosecution. The accused parent is given one important defence: if the parent can show that it was necessary to protect the child from "danger of imminent harm", there will be no conviction.

(b) The Garnishment, Attachment and Pension Diversion Act, S.C. 1980-81-82, c. 100, as amended

This Act allows the salaries of public service employees, employees of Crown corporations and members of the RCMP and Canadian armed forces to be "garnished" or "attached"; that is, collectable by all creditors of the employee, including spouses who have not been receiving support payments. In addition, the Act allows spouses who have not been paid support, but not other creditors, to attach the pensions of certain former Crown employees. The pensions of veterans of World War II are not included in these provisions.

(c) Bills C-47 and C-48 (New Divorce Act, and Enforcement Legislation)

Bill C-47, the Divorce Act, 1985 was introduced into the House along with Bill C-48 in May 1985. Bill C-47 would repeal the existing Divorce Act and replace it. Marriage breakdown would become the ground for divorce. It would be established in two different ways which would incorporate the "fault"-"no fault" distinction. Fault grounds would be the commission of adultery or physical or mental cruelty. The "no-fault" marriage breakdown would be established by the physical separation of the couple for a period of one year measured back from the date upon which the divorce decree is granted. This method of calculation

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would permit the spouses to begin divorce proceedings before the expiry of the one-year period.

In order to encourage reconciliation the Bill would allow couples to resume living together for a period or periods totalling three months without any effect on the calculation of the one year period.

Bill C-47 would make important changes to the law relating to support and custody. (As an aside, support is known as "maintenance" under the present Act. The proposed legislation would change the term to "support" to conform with current usage.)

The present Divorce Act provides little guidance as to how orders for support should be determined. Bill C-47 would clarify the relevant factors, making clear that marital misconduct should not be a factor in determining support, and specifically recognizing a number of elements: the length of time the couple lived together; the activities each spouse performed during the marriage; and any agreements between the spouses regarding support. The Bill would also set out a number of objectives for determining support orders for a spouse. They are: to recognize advantages or disadvantages to spouses arising from a marriage; to apportion financial responsibilities for children fairly; to relieve economic hardship arising from the breakdown of a marriage; to promote the economic self-sufficiency of the dependent spouse insofar as practicable. Both spouses would be responsible for supporting children, according to their relative ability to do so. Courts would be able to set time limits on support orders, something which they are not able to do now.

The Bill would expand on present provisions for the variation of support and custody orders. Time limited support orders would be difficult to vary before the time limit, unless one could show that there had been a change in the circumstances of either spouse. These orders would be extremely difficult to vary after the time had expired, although it would be possible to do so in some cases. Orders could be varied by a court which did not issue the order, but such variations would not be final: they would have to be confirmed by the court in which the order originated.

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As a result of amendments at the Committee stage, provisions for custody orders would be changed in ways which are relevant to enforcement issues. A number of groups which represent parents without custody have claimed that they do not pay support or are driven to kidnap their children because they and their relatives are often prevented from being with their children in a significant way as parents (or as family). A number of custody and access provisions would address some of their concerns. The Bill would expressly permit an order for joint custody, and an order for custody or access to someone who is not a parent, a grandparent, for example. In making a custody order a court would have to take into consideration the willingness of the proposed custodial parent to allow the other parent to be with the child. Access orders would be made on the principle that a child should have as much contact with each parent - custodial or non-custodial - as is in the child's best interests. A parent with access would have the right to be given information about the child's health, education and welfare. A parent with custody who moves from his or her original address may be required by court order to notify the other parent of the new address and the time of the change. All these provisions would be limited by the principle that custody and access orders must be directed to meeting the best interests of the child.

Most of the provisions which concern enforcement directly are set out in Bill C-48. Some are to be found in C-47, however. The Bill would expressly provide that all support and custody orders issued under the Act may be enforced in the same way as provincial orders. This goes a long way to solving practical problems created by a divided jurisdiction in the area of family law. It would also allow a court to order a spouse to pay a specific amount for support and to provide security for those payments, which could be used if they were not made.

Bill C-48, the Family Orders and Agreements Enforcement Assistance Act, would provide a mechanism for the release of information from federal information banks to assist in locating spouses who fail to make support payments or to honour custody and access arrangements. Information would be made available wherever there had been default, whether the award or order had been granted under federal or provincial

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legislation, or was covered by agreement between the parties. The Bill would also make available for garnishment certain federal moneys, such as income tax refunds, unemployment insurance benefits and Canada Pension Plan and Old Age Security payments, in the case of default in payment of both federal and provincial support orders. At present, there are certain statutory bars, as well as the existence of Crown prerogative, which prevent creditors from reaching such funds.

2. Provincial Action

Most provinces are considering changes to their custody enforcement legislation. On October 1, 1982 in Ontario, amendments to the Children's Law Reform Act came into force which have as their stated purposes the recognition and enforcement of custody and access orders made outside Ontario, making provision that courts in Ontario decline to hear custody cases where it is more appropriate for the matter to be heard in a place with which the child has a closer connection, and discouraging kidnapping as an alternative to determining custody by "due process" of law. The Manitoba legislature has a similar bill before it.

Most provinces and territories (Saskatchewan and the Northwest Territories are the exceptions) have adopted or are on the point of adopting the Convention on the Civil Aspects of International Child Abduction, the express purpose of which is to ensure that custody and access rights obtained in one state are effectively respected in another, and to return children wrongfully brought to or kept in a member state. The Convention has been ratified by Canada and came into force in Canada on December 1, 1983.

Since 1983, when the report of the Committee on the enforcement of custody and support orders was issued, there has been much progress towards making provincial support enforcement procedures effective and uniform throughout Canada. Provinces are preparing or have introduced legislation to establish a government-run enforcement system. A special agency will be responsible for monitoring payments and collecting amounts due from defaulters. These agencies will be given wide powers to trace

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defaulters and to attach their assets if necessary. They will be helped by the provisions of federal Bill C-48.

CHRONOLOGY

1968 - The Divorce Act, Canada's first uniform divorce legislation, was passed by Parliament.

1972 - The Report of The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (The Molgat-MacGuigan Report) recommended that the jurisdiction over marriage and divorce should be transferred to the provincial legislatures.

1978 - In its study Towards a New Canada the Canadian Bar Association's Committee on the Constitution endorsed the Molgat-MacGuigan recommendation subject to a provision that a divorce obtained in any province be recognized throughout Canada.

May 1978 - Bill C-51, making it an offence for parents to kidnap their own children received first reading in the House.

November 1978 - Bill C-51 was reintroduced to the House as Bill C-21.

January 1979 - The Report of The Task Force on Canadian Unity (Pépin-Robarts Report) concluded that the provinces are responsible for their social well-being and should have exclusive (or occasionally concurrent) jurisdiction over marriage and divorce.

5-6 February 1979 - At the Federal-Provincial Conference of First Ministers on the Constitution held in Ottawa there was virtual agreement on a draft proposal to transfer much of the divorce jurisdiction (including the power to legislate over custody and support) and all of the marriage jurisdiction to the provinces.

March 1979 - The National Action Committee on the Status of Women at its annual meeting held in Ottawa passed a resolution recommending that federal jurisdiction over divorce not be given to the provinces. This was the first expression of public (non-governmental) opinion on the issue.

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October 1979 - A Federal-Provincial Conference held in Halifax again agreed to a position similar to that set out in February's draft proposal.

8-11 July 1980 - At a meeting of the Continuing Committee of Ministers on the Constitution held in Montreal, the Honourable Jean Chrétien acknowledged public criticism of the draft proposal and stated that some provincial governments had had second thoughts about aspects of the proposal. He stated that the federal position was to reconsider the area of enforcement of support and custody orders.

8-12 September 1980 - A revised draft proposal with respect to family law was considered at a meeting of First Ministers on the Constitution held in Ottawa. The revision provided for the limited recognition throughout Canada of support and custody orders made pursuant to provincial laws. Manitoba and Prince Edward Island rejected the proposal entirely. Other provinces expressed their reservations with respect to the revised section.

12 January 1981 - Bill C-53, containing revised provisions with respect to child kidnapping, received first reading.

22 June 1981 - The Federal-Provincial Committee on the Enforcement of Custody and Maintenance Orders was established. It consisted of representatives from the federal government and all the provinces.

4 August 1982 - Bill C-127, composed of the substance of Bill C-53 was introduced into the House of Commons.

September 1982 - The Canadian Bar Association passed a resolution that the federal government be urged to retain jurisdiction over divorce legislation in order to achieve uniformity and equality of rights and obligations existing from marriage breakdown. This was the second time the group passed a resolution to this effect.

October 1982 - The Minister of Justice, the Honourable Mark MacGuigan, announced his intention not to transfer divorce jurisdiction to the provinces and that he would reform divorce law.

1983 - Bill C-127 in force.

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- Garnishment, Attachment and Pension Diversion Act given Royal Assent; provisions relating to the attachment of salaries (not pensions) in force.

- Federal-Provincial Committee on enforcement issued its final Report.

1984 - Bill C-10, amending the Divorce Act, received first reading.

- Provisions relating to the attachment of pensions of Crown employees (Garnishment, Attachment and Pension Diversion Act) in force.

February 1986 - Bills C-47 and C-48 dealing with divorce, custody, support and the enforcement of support orders were given Royal Assent.

June 1986 - Bill C-47 (Divorce) in force. Bill C-48 (Enforcement) will probably be in force by January 1987.

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